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IN THE

Supreme Court of the United States

No. [redacted] 41

PYRAMID MOTOR FREIGHT CORP.,

Petitioner,

—*vs.*—

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLER, LOUIS H. SHAPIRO, SAM LANDRITH and JOSEPH GANNON,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

LEON E. SPIELVOGEL,
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RAMEY and MCKELVEY, and
JOHN W. SCOTT,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM—1945

No. 821

PYRAMID MOTOR FREIGHT CORP.,

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—vs.—

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLI.., LOUIS H. SHAPIRO, SAM LANORITH and JOSEPH GANNON,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Summary Statement of Facts and Proceedings

This matter in which certiorari is sought, came before the Circuit Court of Appeals, Second Circuit, on appeal from a judgment of the United States District Court for the Southern District of New York, dismissing the complaint in an action which was commenced by the respondents under and pursuant to the Fair Labor Standards Act of 1938 (hereinafter referred to as the Act) to recover from the petitioner unpaid overtime wages.

The answer which the petitioner interposed to the complaint (R. 24-26) contained an affirmative defense to the effect that the respondents were exempt from the provisions of the Act for the reason that the services which they performed for the petitioner consisted of those of loaders' and drivers' helpers (R. 26).

When the action was called to trial, the attorneys for the respective parties prepared and submitted to the Trial Court, an order (R. 34-44) which framed the issues and set forth an agreed statement of facts substantially as follows:

1. The petitioner (a New York Corporation) was engaged in business as a common carrier of property for hire by motor vehicles in interstate and foreign commerce. It operated approximately 190 motor trucks between the cities of Wilmington, Delaware; Philadelphia, Pennsylvania and New York, New York, under a certificate of public convenience and necessity issued by the Interstate Commerce Commission (R. 35).

2. Petitioner's main terminal was located at West 11th Street, New York City, and it likewise maintained a subterminal in the Garment District, at premises 322 West 38th Street, New York City, to and from which freight consigned and originating in that district was shipped and delivered (R. 35).

3. Trucks carrying freight shipped from points outside of New York and intended for delivery therein, were driven to the petitioner's main terminal where new drivers and helpers took over the trucks and drove them to the 38th Street sub-terminal. Upon arrival at the subterminal the helper proceeded to unload the truck by removing packages and parcels from the body thereof and placed them on the tail board of the truck from where they were removed by the respondents and placed

within the sub-terminal building, after which the respondents delivered the packages to the various consignees located in and about the Garment Center, by and through the means of hand trucks which were manually pushed through the streets. In some instances the said trucks, instead of proceeding directly to the sub-terminal, were driven to locations within the Garment Center where they were parked alongside the street curbs where the same loading operations above described were performed, except that the respondents delivered the said packages and parcels directly to the consignees thereof instead of temporarily placing them within the petitioner's sub-terminal (R. 35-36).

4. In the late afternoons or early evenings, packages and parcels consigned from the Garment Center and intended for delivery outside of the State of New York, were picked up by the respondent's at the consignor's places of business, and hand-trucked by them to the 38th Street Terminal where they were loaded into the waiting trucks, and except in some instances where the weight or size of the packages required the respondents to assist the truck helper in placing them within the body of the trucks, their participation in loading operations was limited solely to lifting the packages to the tail board of the trucks, from where they were removed and stacked in the truck by the said helper (R. 36-37).

5. All of the respondents, with the exception of Shapiro, generally walked between the various points where the trucks stopped to discharge packages, but Shapiro, as a matter of fixed duty, rode on the truck with the driver and his helper about four (4) or five (5) hours each day during the period from August, 1939 to September,

1941. The remainder of his work day (about three and a half (3½) hours) was devoted to inside office work at the sub-terminal (R. 57).

6. The petitioner was engaged in commerce, and the respondents were engaged in commerce and in the production of goods for commerce within the meaning of the Act, and that respondents were not compensated for the overtime services which they rendered to petitioner (R. 34).

The order likewise fixed the sums of money due the respondents as unpaid overtime compensation in the event that the Trial Court found that they were covered by the Act, (R. 38, 40-44), and framed the issues as follows:

1. Plaintiffs (Respondents) contend that they are covered by the Fair Labor Standards Act of 1938 and particularly by Section 7 (a) thereof (R. 38). Defendant (Petitioner) contends that plaintiffs (Respondents) are not covered by the Act and are specifically exempt from the provisions of Section 7 (a) by Section 13 (b) (1) thereof (R. 38).

In lieu of a trial the order was submitted to the Trial Judge who, under date of November 29, 1943, rendered an opinion (R. 45-55) which was substantially to the effect, that inasmuch as the petitioner was a common carrier of goods in interstate commerce and thus under the jurisdiction of the Interstate Commerce Commission, the respondents, as a condition precedent to recovery were duty bound to show that they did not belong to a class of employees over whom the Commission had the power to regulate maximum hours and working conditions, and in the absence of such a showing, the Court should not undertake to determine from the agreed statement of facts whether or not the respon-

dents were under the jurisdiction of the Commission and thus exempt from the provisions of the Act by reason of Section 13 (b) (1) thereof. The opinion made no disposition whatever of the action but allowed it to remain in *status quo* in order to allow the respondents an opportunity to apply to the Commission for a ruling fixing their status as employees. Presumably the Court was of the opinion that with such ruling it could then proceed to a final determination of the cause before it.

The respondents declined to adopt the procedure suggested by the opinion and thereupon moved the District Court for a final disposition of the action, either by way of a judgment in their favor or for an order dismissing the complaint (R. 56-62).

As the result of such motion, the Trial Judge, under date of January 12, 1945, rendered a second opinion (R. 63-68) substantially in conformity with the first opinion, and thereafter and under date of February 14, 1945 signed an order dismissing the complaint. An appeal from such order was then taken to the Circuit Court and the notice of appeal to that effect was filed on April 2, 1945.

Due to an inadvertance on the part of the attorneys for the respondents, the Record on Appeal was not filed within ninety days following the date on which the Notice of Appeal was filed. However, upon due notice to the attorney for the petitioner, an order was applied for and obtained from the Circuit Court extending the respondents' time within which to file the Record, to and including September 1, 1945 (R. 73). The order extending the time was duly complied with, and the Record on Appeal was filed in accordance therewith.

Prior to the argument of the Appeal, the attorney for the petitioner moved the Circuit Court for an order dismissing the appeal on the ground that the Record was not filed within the time prescribed by Statute, and the Circuit Court had

no power to extend the filing date (R. 74-83). This motion was duly considered by the Circuit Court and properly denied (R. 83). On the argument of the appeal itself the petitioner again renewed its motion to dismiss on the grounds above stated and the motion was again denied (R. 85), by the unanimous opinion of the Circuit Court (R. 84-88) which affirmed the judgment of the District Court as to Shapiro, but reversed such judgment as to the other respondents. Other particulars of the proceedings not specifically mentioned herein are contained and set forth in the statement under Rule 13 of the Rules of the Circuit Court (R. 1-3).

Opinions Below.

The opinions of the United States District Court for the Southern District of New York are reported at 54 Fed. Supp. 565, and 59 Fed. Supp. 341.

The Opinion of the Circuit Court of Appeals for the Second Circuit has not been officially reported.

Jurisdiction.

The judgment of the District Court was filed on February 19, 1945.

The judgment of the Circuit Court was filed on December 28, 1945.

The petition for a Writ of Certiorari to the Circuit Court of Appeals was filed on February 7, 1946.

The petition, brief, record and notice of filing petition was served upon counsel for the respondents on February 19, 1946.

The petitioner invokes the jurisdiction of this Court under the Act of February 13, 1925 (c. 229; 43 Stat. 938 amending the Judicial Code Sec. 244) (28 U. S. C. A. 347a) and Rule 38, subdivision (5) of the Rules of the Supreme Court.

Questions Which Petitioner Claims Are Presented by this Application.

The manner in which the petitioner has set forth what it considers to be the questions presented by this petition is somewhat confusing, therefore the respondents undertake here to re-state what appears to them to be the questions which the petitioner intended to propound. These questions simply stated, are as follows:

1. (a) Does the Commission have authority to determine the class of motor carrier employees over whom it has the power to prescribe qualifications and maximum hours of service?

(b) Does it constitute an invasion of the Commission's administrative authority for a Court to make such a determination?

2. If the Commission determines that the activities of certain motor carrier employees affect the safety of operation of motor vehicles, does a judgment by the Circuit Court of Appeals in favor of such employees in an action commenced under the Act constitute a judicial review of the Commission's determination in regard to such activities?

3. (a) Inasmuch as the Commission has undertaken to exercise jurisdiction over a class of motor carrier employees known as "loaders" whose sole duties are to load and unload motor vehicles and transfer freight between motor vehicles and between the vehicles and the warehouse, is it error for the Circuit Court, in an action commenced under the Act, to decide that only so much of the time spent by such employees in stacking and

piling freight in outgoing vehicles is devoted to activities which affect the safety of operation of such vehicles; and

(b) Was it error for the Circuit Court to render judgment in this action in favor of the respondents when the petitioner failed to prove the amount of time which the respondents devoted to activities which affected the safety of operation of motor vehicles?

4. Was the Circuit Court correct in deciding that the Commission intended to assert jurisdiction over that class of motor carrier employees known as "loaders" only in the event that a substantial part of their time is spent in stacking and piling freight in outgoing vehicles?

5. Did the Circuit Court abuse its descretion in enlarging the respondents' time within which to file and docket the record on appeal from the District Court?

While the foregoing would seem to summarize what the petitioner claims should be reviewed by this Court, the record itself discloses that such questions are wholly academic insofar as this proceeding is concerned and have no bearing whatever upon the judgment of the Circuit Court which was predicated entirely upon a basic rule of law involving the petitioner's failure to meet the burden of proof imposed upon it by the affirmative defenses interposed to the complaint. The respondents deny that the questions propounded by the petitioner arose from the decision of the Circuit Court, or that they are pertinent to the instant application for a Writ of Certiorari.

SUMMARY OF ARGUMENT

POINT I.

The decision of the Circuit Court did not invade the administrative authority of the Commission and no important questions of Federal law arose therefrom which require review by this Court.

POINT II.

The granting of the order extending the respondents' time within which to file and docket the record on appeal did not constitute an abuse of judicial discretion.

DISCUSSION

I.

The decision of the Circuit Court did not invade the administrative authority of the Commission and no important questions of Federal law arose therefrom which require review by this Court.

Under Point I. of its brief, the petitioner asserts that by reason of this Court holding in *U. S. vs. American Trucking Associations, Inc.*, 310 U. S. 534, that the jurisdiction of the Commission is confined to those employees whose activities affect the safety of operation, the Administrator of the Wage and Hour Division of the Department of Labor has been given an added incentive to agitate for an expansion of the Act to the limit of its application in the motor carrier industry; and that in order to accomplish his purpose in that respect, he has introduced and fostered wholly impractical ideas and extremist points of view which encroached upon the Commission's administrative field. The

petitioner also contends that a number of the orders and rulings which have emanated from the Administrator in his zealousness to extend the application of the Act have given rise to many questions of Nationwide importance which prompted this Court to grant certiorari in *Levinson vs. Spector Motor Service*, (139 Oct. Term, 1945) and *Comet Carriers, Inc. vs. Walling*, (609 Oct. Term 1945). It is likewise contended that such questions are more sharply presented by this case than by those in which certiorari was granted; the inference being that the *Levinson* and *Comet* cases should be relegated to a secondary position and this Court here undertake to decide from the facts presented a controversy which is alleged to exist between the Administrator and the Commission and which threatens the future welfare of the entire motor industry.

The fact that there may or may not exist a conflict of opinions between the Administrator and the Commission regarding the extent of their respective powers is of no significance insofar as it pertains to this application, and the difficulty with the petitioner's position at the very outset is to be found in the fact that it either has, and still is laboring under a misapprehension regarding the nature of the only question which was passed upon by the Circuit Court of Appeals, or else it has and is attempting to confuse the issue and divert attention to matters other than those which are directly involved herein.

There is nothing in this record which even remotely involves any controversy or conflict of authority between the Courts, the Administrator and the Commission; neither does this application present a situation where the Circuit Court has attempted to limit, enlarge or in any manner pass upon the administrative functions of either of these agencies. On the contrary, the only question presented to and passed upon by the Circuit Court was one which involved a basic rule of law, fixing the burden of proof and

designating the party upon which it should rest. It is therefore inconceivable that the Circuit Court's decision could have possibly given rise to any question comparable to those which permitted this Court to consent to review the *Comet* and *Levinson* cases. It might very well be that some speculation did arise from the decision in the *Comet* case, especially where the employee who admittedly belonged to a class over whom the Commission exercised jurisdiction and who drove and operated a motor truck in both intrastate and interstate commerce, was held nevertheless not to be subject to the jurisdiction of the Commission because a substantial part of his time was not devoted to operational activities in interstate commerce.

By the same token, an equal opportunity for speculation may have arisen from the *Levinson* case. There the question was raised as to whether or not the Commission's ruling fixing the extent of its jurisdiction (28 M. C. C. 131) was to be construed as applying to a substantial part of time devoted to activities affecting safety of operation or whether the activities substantially affected the safety of operation. This Court may have considered the question of major importance due to the fact that the employee, although the foreman of a gang whose entire time was devoted to activities which affected safety of operation, did not himself devote a substantial part of his time to such activities. On the surface it is evident that these cases may have given rise to matters which should be passed upon by this Court, but they are far removed and entirely unrelated to the case at bar, either in form or in substance and there is no common design or mutuality of interest between them. In both the *Levinson* and *Comet* cases the facts were established by a full disclosure of the evidence whereupon the Courts proceeded to interpret the law in the light of the established facts. Whether such interpretations are in accord with the views of this Court are matters which still remain to be

seen, but this petition does not present a similar or comparable situation.

Here the Circuit Court was faced with a very simple problem; it had before it an agreed statement of facts which showed conclusively that the respondents' duties were divided into two categories, neither of which, in the absence of further proof, could be said to have affected safety of operation. In the mornings the respondents would meet in-bound trucks and as packages were unloaded by the driver's helper, the respondents would take such packages from the tailboard of the trucks and temporarily place them in the petitioner's sub-terminal from which they were later removed and hand-trucked through the streets by the respondents and delivered to the consignees whose names and addresses appeared thereon. In the late afternoons and early evenings this procedure was reversed and it then became the duty of the respondents to call upon various manufacturers in the Garment District and pick up packages intended for delivery outside of the State of New York, and hand-truck them to the petitioner's trucks which were sometimes parked at its sub-terminal and on other occasions on the public streets alongside the curbs. In some instances when the parcels were unusually large or heavy, the respondents assisted the driver's helper in placing them in the body of the truck. All of the respondents, with the exception of Shapiro, generally walked between stopping points, but occasionally they rode on the trucks between such points in order to avoid the loss of time entailed by walking. On the other hand, Shapiro, as a matter of fixed duty and in addition to the driver and the driver's helper, rode on the trucks for a period of four or five hours each day, but the remainder of his time was devoted to inside office work (R. 36-37).

On the basis of the facts thus presented, together with the petitioner's concession that the respondents were engaged

in the production of goods for commerce within the meaning of the Act, during the course of which they had rendered overtime services to the petitioner for which they were not compensated (R. 34), it became apparent that they were entitled to the full benefits of the Act, unless the evidence clearly disclosed that they came within the exemption provisions thereof. *Kirschbaum Co. vs. Walling*, 316 U. S. 517; 62 Sup. Ct. 1116; *Warren-Bradshaw Drilling Co. vs. Hall*, 317 U. S. 88. Such being the case, the Circuit Court had to examine the record in order to determine that it was absolutely bare of any statement or facts from which it could be concluded that the respondents were not entitled to the benefits of the Act, and in the absence of any proof whatever in support of the petitioner's defense, the Circuit Court had no alternative except to decide that the petitioner had not carried the burden of proof with which it was imposed.

In support of the suggestion that the petitioner is either attempting to confuse or has itself become confused with respect to the significance of the Circuit Court's decision, attention is called to that part of its brief at page 21, wherein it is stated:

> "That court, first without any reference to what the Commission may have decided, approached the case as if there were presented to it a judicial question (rather than administrative) as to whether or not it was shown of record that the work of the suing employees affected safety of motor carrier operations. That court, of its own volition, and not on any sort of record fully developing facts that would be pertinent in an administrative proceeding, resolved that safety of operations is affected only by so much of the work of those engaged solely as loaders or helpers as may involve respectively their riding the trucks or their standing inside outgoing truck vehicles piling and stowing the freight."

Obviously this case presented a legal question rather than an administrative one, and the Court neither invaded the Commission's jurisdiction nor collaterally attacked any of its rulings or determinations in deciding that the petitioner had not carried its burden of proof. The mere fact that the petitioner throughout its brief, refers to the respondents as "loaders" and asserts that the stipulated "facts were agreed, the employees were solely engaged in work as 'loaders' " (Petitioner's Brief 8), neither makes them loaders nor does it lend truth or color to the statement that they were engaged and worked as loaders. On the contrary, the respondents were employed and rendered services solely as "push-cart and delivery boys", a class of motor carrier employees over whom the Commission has not seen fit to extend its jurisdiction. Their trade names adequately describe their work: namely, pushing hand-trucks through the City streets delivering packages and parcels, and their activities in this respect could not possibly have affected safety of operation. The Circuit Court being mindful of the fact that in some few instances where the respondents, as an accommodation to a driver's helper, assisted him in placing heavy packages in the truck, considered these activities in the light of the Commission's ruling that it "has power to establish qualifications and maximum hours of service with respect only to employees who devote a substantial part of their time to activities which directly affect safety of operation" (28 M. C. C. 131), and thereupon rightfully concluded that upon the record the petitioner had not carried the burden of showing that "loading" occupied a substantial part of the respondents' working time. There was no other conclusion for the Court to reach in view of the utter lack of evidence to support the petitioner's claim of exemption. While the petitioner's inability to support its defense may be disconcerting it is none the less the answer to this application and "perplexing as petitioner's

problem may have been, the difficulty does not warrant shifting the burden to the employee". *Overnight Motor Transp. Co. Inc. vs. Missel,* 316 U. S. 572, 583. See also *Helliwell et al. vs. Haberman,* 140 Fed. 2d 833; *Smith vs. Porter,* 143 Fed. 2d 292; *Stratton vs. Farmers Produce Co.,* 134 Fed. 2d 825; *Helena Glendale Co. vs. Walling,* 132 Fed. 2d 616.

If the Circuit Court erred in any respect it was in connection with the respondent Shapiro. Despite the fact that he rode on the petitioner's trucks for the greater part of each working day, the fact remains that the record is bare of any evidence which would indicate the nature of the services which he rendered. No doubt the Court concluded that because he rode on the truck he was a driver's helper and thus under the Commission's jurisdiction, but at best, this is only an inference which does not seem to flow from any of the facts established. The mere act of riding upon a truck would not within itself appear to be an activity which could affect safety of operation and it is just as consistent to assume that his duties were devoted to checking or recording packages as it is to assume that he loaded or assisted in loading them, particularly in view of the fact that each truck was manned by a driver and a helper whose duty it was to load and unload. The petitioner failed to carry the burden of proof even insofar as Shapiro was concerned, and grave doubt exists as to whether the Circuit Court was justified in assuming, in the absence of positive proof, that he was subject to the jurisdiction of the Commission and thus exempt from the provisions of the Act. Although the respondents feel that no reason whatever exists for granting certiorari herein, it is urged that in the event this Court should decide to the contrary, the judgment of the Circuit Court, insofar as it pertains to Shapiro, should likewise be reviewed.

II.

The granting of the order extending the respondents' time within which to file and docket the record on appeal did not constitute an abuse of judicial discretion.

It is not deemed necessary to comment at any great length upon the petitioner's contention that the Circuit Court abused its discretion in extending the respondents' time within which to file and docket the record on appeal. Suffice it to say that the order extending such time was made and entered pursuant to the provisions of Rules 6 (b) (2) and 73 (a) of the Federal Rules of Civil Procedure, which vest in Circuit Courts of Appeal power to enlarge the time for filing even after the expiration of the period (90 days) provided by law. *Ainsworth vs. Gill Glass & Fixture Co.*, 104 Fed. 2d 83; *Mutual Benefit Health & Accident Assn. vs. Snyder*, 109 Fed. 2d 469.

There is no conflict of opinion in regard to the construction of these rules for the reason that this very question has been passed upon by different Circuit Courts on different occasions, and their decisions have always been wholly consistent. On two separate occasions the petitioner's motion to dismiss the appeal was heard at great length and each time the circumstances concerning the delay in filing were fully inquired into. The petitioner's claims were carefully considered and rejected and there was no abuse of judicial discretion in granting the order complained of.

CONCLUSION.

The Petition should be dismissed and the Writ of Certiorari denied.

Respectfully submitted,

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